93-936

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NORTH STAR STEEL COMPANY, INC.,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Worker Adjustment and Retraining Notification Act, does an award of "back pay" for calendar days within the notification period that never would have been worked, even if sufficient notice had been provided, contravene the express terms of the statute, Congressional intent, and applicable canons of statutory construction?

PARTIES BELOW

Petitioner/Defendant Below

North Star Steel Company, Inc. ("North Star") is a wholly-owned subsidiary of Cargill, Inc., which is a privately-held corporation. None of Cargill's shareholders is itself a publicly-traded entity.

Respondent/Plaintiff Below

The United Steelworkers of America, AFL-CIO-CLC ("the Union") is the Respondent herein and was the Plaintiff below. The Judgment entered by the District Court and affirmed on appeal resulted in an award of monetary damages to numerous individuals on whose behalf the Union initiated this action. The names of these individuals are set forth in the Appendix hereto ("App.") at 17a-26a.

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PETITION FOR A WRIT OF CERTIORARI

North Star, through the undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment and opinion of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 5 F.3d 39 (App. 1a-10a). The order of the district court is reported at 809 F. Supp. 5 (App. 27a-35a). An earlier decision of the district court is reported at 817 F. Supp. 522 (App. at 36a-41a).

JURISDICTION

The judgment of the court of appeals was entered on September 14, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTE INVOLVED

This case involves an interpretation of the Worker Adjustment and Retraining Notification Act ("WARN Act" or "the Act"). 29 U.S.C. §§ 2101-09 (1988). The principle relevant provision is Section 5(a)(1) of the Act, which provides:

> ADMINISTRATION AND ENFORCEMENT OF REQUIREMENTS
>
> (a) CIVIL ACTIONS AGAINST EMPLOYERS.—(1) Any employer who orders a plant closing or mass layoff in violation of Section 3 of this Act shall be liable to each aggrieved employee who suffers an employment loss as a result of such closing or layoff for—
>
> (A) back pay for each day of violation at a rate of compensation not less than the higher of—
>
> (i) the average regular rate received by such employee during the last 3 years of the employee's employment; or
>
> (ii) the final regular rate received by such employee; and
>
> (B) benefits under an employee benefit plan described in section 3(3) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(3)), including the cost of medical expenses incurred during the employment loss which would have been covered under an employee benefit plan if the employment loss had not occurred.
>
> Such liability shall be calculated for the period of the violation, up to a maximum of 60 days, but in no event for more than one half the number of days the employee was employed by the employer.

29 U.S.C. § 2104(a)(1) (1988).

STATEMENT OF THE CASE

North Star operates a plant in Milton, Pennsylvania ("Milton plant") where it produced hot-rolled steel bars and other steel products. In early 1991, North Star employed over 280 individuals at the Milton plant. By late February, however, poor economic conditions and a recent transformer failure necessitated a sudden decision to cease most production operations there. Accordingly, on February 25, 1991, North Star laid-off almost its entire Milton work force without prior notice. Those affected included approximately 250 employees represented by the Union ("represented employees").

On September 9, 1991, the Union initiated this litigation, asserting that the represented employees were entitled to damages under the WARN Act as a result of the February 25, 1991 cessation of production. The Union later moved for summary judgment, and, in reply, North Star acknowledged that a technical violation of the WARN Act had occurred. North Star explained that, at the time of the cessation of operations, it had no idea how long the layoff would last. Moreover, it demonstrated its concern that a premature notification under the WARN Act would have itself constituted a violation of the Act.

Nonetheless, on April 9, 1992, the district court granted the Union's motion for summary judgment as to whether North Star's sudden cessation of operations at the Milton plant entitled the represented employees to damages under the Act. The district court concluded North Star had failed to make a required showing that it had reasonable grounds to believe that its failure to give notice was not a violation of the WARN Act. As a result, the district court declined to ameliorate any damages to which the represented employees were entitled. App. at 39a-40a. However, the court did not make a determination as to the amount of damages to which the represented employees were entitled because the Union requested that the parties

be given an opportunity to stipulate to damages. App. at 40a.

The parties were able to agree that the normal work schedule for the represented employees was an eight-hour day, five-day work week. The parties also did not disagree as to the violation period for which damages would be calculated. Nonetheless, the parties could not stipulate as to the amount of damages North Star owed the represented employees because there was a disagreement as to the number of days within the violation period for which wage-loss damages should be paid. This disagreement arose from the issue of statutory interpretation North Star now presents for review.

Because the parties were unable to resolve the matter of wage-loss damages, the Union again moved for summary judgment as to the amount of damages to which the represented employees are entitled. Consequently, the district court was presented with the parties' competing views as to the meaning of the Section 5(a)(1)'s damages section, which provides "back pay for each day of violation . . . . Such liability shall be calculated for the period of the violation. . . ." 29 U.S.C. § 2104(a)(1) (1988).

North Star maintained that the WARN Act provides back pay only for each day of the violation period for which wages otherwise would have been paid if notice had been provided. Thus, North Star opined that its obligation was limited to paying "back pay" for each of the forty-four scheduled working days within the specific sixty-day violation period involved herein. In contrast, the Union asserted that each of the represented employees was entitled to eight hours of pay for each of the sixty calendar days within the violation period, without regard to whether the represented employees would have worked all of those days. Thus, it maintained that the represented employees were entitled to sixty days of pay at eight hours per day, or 480 hours of "back pay."

The district court granted the Union's motion, determining that "[e]ach day that North Star failed to notify its employees of that layoff in advance of February 25, 1991, is a 'day of violation' for the purposes of calculating damages." App. at 30a (quoting 29 U.S.C. § 2104 (a)(1)(A) (1988)). North Star paid the represented employees the amount not in dispute and filed an appeal.

The court of appeals affirmed the district court's determination that the WARN Act requires payment of damages for each day of the violation period. The court rejected North Star's argument that Congress' codification of the concept of "back pay" evidenced an intent to fashion a make-whole remedy. App. at 6a-8a. The Court also declined to determine whether its construction of Section 5(a)(1) was contrary to the intent of Congress as evidenced by the fact that it would result in bizarre outcomes when applied to individuals who do not work a traditional eight-hour day, five-day work week. App. at 8a-9a & n.6.

REASONS FOR GRANTING THE PETITION

The importance of the issue presented here transcends the specific dispute about the damages that the represented employees are entitled to recover from North Star. Rather, the court of appeals' construction of Section 5(a)(1) will have significant implications for every voluntary compliance effort and every contested case under the WARN Act.[1]

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[1] The issue presented here also was argued before the Fifth Circuit Court of Appeals on August 5, 1993 in *Carpenters Dist. Council v. Dillard Dept. Stores, Inc.*, Nos. 92-3419, 3613, *reviewing* 778 F. Supp. 297 (E.D. La. 1991). North Star is unaware of any disposition of *Dillard Dept. Stores* as of the date this Petition was sent to the printer. The other reported cases in which damages have been discussed utilize different assumptions. *Compare Jones v. Kayser Roth Hosiery, Inc.*, 748 F. Supp. 1292 (E.D. Tenn. 1990), *modified*, 753 F. Supp. 218 (1990) (utilizing make-whole approach), *with United Electrical Workers v. Maxim*, 5 Indiv. Empl. Rts. Cas. (BNA) 629 (D. Mass. 1990) (awarding sixty days of pay).

The result reached by the court of appeals also conflicts with this Court's repeated admonitions regarding statutory construction. First, the court failed to give effect to the settled meaning of the terms employed by Congress in the WARN Act. Second, the interpretation of the Act adopted by the court results in anomalies and absurdities that belie the court's determination that the WARN Act is unambiguous. Finally, given the court of appeals' construction of the Act, the other provisions of Section 5 no longer can be read in consonance with Section 5(a)(1). The result of these departures from this Court's directives is a direct contravention of the expressed intent of Congress to fashion a make-whole remedy.

I. THE ISSUE PRESENTED IS OF THE UTMOST IMPORTANCE TO THE GROWING NUMBER OF EMPLOYERS AND EMPLOYEES AFFECTED BY THE OPERATION OF THE WARN ACT.

Unfortunately, events such as the cessation of operations at North Star's Milton facility are becoming commonplace. The United States Department of Labor Bureau of Labor Statistics recently conducted a Mass Layoff Statistics program. A Government Accounting Office study ("GAO study") of the results of that program concludes that the economic devastation resulting in, and from, plant closures and mass layoffs is both pervasive and growing.

Even in the absence of critical data from heavily-industralized states such as California, Michigan, and Ohio, the GAO study identified "3,078 plant closures or mass layoffs affecting 50 or more workers in 1990. In 1991, the number of such events increased by 26 percent to 3,891. As a result of such events in 1990 and 1991, about 1.4 million workers lost their jobs." GOVERNMENT ACCOUNTING OFFICE, PUB. NO. GAO/HRD-93-18, DISLOCATED WORKERS: WORKER ADJUSTMENT & RETRAIN-

ING NOTIFICATION ACT NOT MEETING ITS GOALS 12 (1993).[2]

Another study published by the Department of Labor concludes that between 1987 and 1992, "the number of workers who lost their jobs due to plant closings, company failures, or other curtailments in employment totaled 5.6 million." This study focused on individuals who were separated involuntarily for economic reasons from a position in which they had three or more years of service. During the stated period, 52.1% of those employees were separated as the result of plant closure or relocation. JENNIFER M. GARDNER, RECESSION SWELLS COUNT OF DISPLACED WORKERS, *in* UNITED STATES DEP'T OF LABOR, MONTHLY LABOR REVIEW 6 (vol. 116 No. 6 June 1993).

The express focus of the WARN Act is on requiring advance notice of such events. Yet, where notice is not provided for any reason, it is imperative under the Act that there be an easily-discernible formula for determining an employee's entitlement to damages. Indeed, where notice is not provided, the WARN Act provides incentives for an employer to make prompt payment of "back pay" damages to ameliorate the instant economic effects of displacement.[3] The same underlying policy creates a compelling interest in the prompt settlement of potential or actual litigation under the WARN Act.

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[2] Although the GAO study is inconclusive as to how many of these occurrences would give rise to liability under the WARN Act, the GAO was able to identify 2,163 events during calendar year 1990 to which the WARN Act probably would apply. *Id.* at 40, app. II.

[3] *See* H.R. CONF. REP. NO. 576, 98TH CONG., 2D SESS. 1053 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2086. The House Conference Report for the Trade and Competitiveness Act ("Trade Act"), which contained the provisions of the WARN Act prior to the President's veto of the Trade Act, were incorporated into the legislative history of the WARN Act as reintroduced. *See* 134 CONG. REC. S8692 (daily ed. June 28, 1988); *id.* H5505 (daily ed. July 18, 1988).

However, the statutory policy favoring a prompt remedy for WARN Act violations is seriously undermined by the court of appeals' decision. Put simply, the methodology employed is unworkable. As a result, voluntary settlement or expedient litigation of such matters will become increasingly improbable. Although the method of calculation used by the court purportedly is simplistic, in reality it will create an unmanageable task of calculating WARN Act liability. Moreover, as shown below, the effect of the court of appeals' decision will impose staggering sums of liability on employers who employ part-time workers, far exceeding the exposure to employers that utilize only full-time workers. There simply is no reason to believe that Congress ever intended such an anomaly.

Given the large numbers of individuals and businesses that are, and will be, affected by the court of appeals' decision, North Star respectfully submits that this Court should grant this Petition and correct the court of appeals' interpretation of Section 5(a)(1). This relief is necessary in order to produce a rational outcome that both comports with the express intent of Congress and permits the proper meaning to be given to the remaining provisions of Section 5.

II. THE COURT OF APPEALS' DECISION TRANSGRESSES THIS COURT'S DIRECTIVES FOR INTERPRETING CONGRESSIONAL ENACTMENTS.

A. The Court of Appeals' Interpretation of Section 5(a)(1) Creates Arbitrary and Irrational Results.

The court of appeals refused to consider the anomalies that result from its interpretation because it concluded that Section 5(a)(1) is unambiguous. App. at 8a (citations omitted). While North Star recognizes that unambiguous statutes should be interpreted consistent with their plain meaning, *see, e.g., Connecticut National Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (citations omitted), this canon of construction should not be used

as blinders to all else that results from a particular interpretation.

As this Court repeatedly has recognized, the existence of anomalous or absurd results may itself establish that the statute is not as unambiguous as it may first appear. *Cf. Watt v. Alaska,* 451 U.S. 259, 266 (1981) ("[A]scertainment of the meaning apparent on the face of a single statute need not end the inquiry.") (citations omitted). Indeed, under the *"Holy Trinity* doctrine," *Public Citizen v. United States Dep't of Justice,* 491 U.S. 440, 473 (1989) (Kennedy, J., concurring) (citing *Church of the Holy Trinity v. United States,* 143 U.S. 457, 472 (1892)), the existence of resulting anomalous or absurd outcomes may negate any showing that the statute is unambiguous.

The court of appeals' refusal to address whether its construction of Section 5(a)(1) "would compel an odd result," *Green v. Bock Laundry Machine Co.,* 490 U.S. 504, 509 (1984), ignores North Star's showing that the construction the court ultimately adopted results in gross disparities in "back pay" awards under the WARN Act. Indeed, the amount to which an individual is entitled under the court of appeals' interpretation bears no rational relationship to the amount that the individual would have earned if notice had been provided.

Specifically, the court's interpretation of Section 5(a)(1) eradicates the function that such variables as hours per work week or the number of work days in a week perform in the calculation of "back pay." Indeed, the amount an individual normally would have worked in a week becomes irrelevant under the court of appeals' interpretation.

A prime example of the many resulting anomalies presented by the court's decision is that full-time (forty hour per week) employees may in fact receive up to 25% less in WARN Act damages than employees who are

scheduled to work as little as twenty hours per week.[4] Suppose a given plant operates on a seven-day schedule with full-time employees scheduled for five eight-hour days, and relief crews scheduled for two ten-hour shifts per week. Thus, the normal weekly scheduled number of hours is forty for full-time employees, and twenty for relief-crew employees.

If the facility is shut down without notice, the court of appeals' measure of damages would, of course, provide 480 hours of pay to the eight-hour per day, five-day per week employees, as it did here. The fallacy of the court's reasoning, however, is evidenced by the fact that the relief-crew employees would receive 600 hours of pay (ten hours per day x sixty days). Thus, the relief-crew members would receive 25% more in WARN damages than those who were regularly scheduled to work twice as many hours.

Not only is such an outcome nonsensical, it also imposes a far greater financial burden on employers of part-time workers. This is especially disconcerting given the fact that the statute and its legislative history are devoid of any indication of a policy favoring the imposition of greater financial burdens on employers of part-time employees. To the contrary, the interest in alleviating the effects of job displacement is implicated the most

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[4] The court of appeals' paraphrasing of the anomaly argument presented by North Star contains an assertion never made below. The court apparently believed that North Star took the position that an employee, who worked only one ten-hour shift per week, was entitled to WARN damages. P. App. at 8a n.6. North Star never took this position as the WARN Act apparently requires that an employee must work at least twenty hours per week in order to be entitled to damages thereunder. 29 U.S.C. § 2101(a)(2), (8) (1988). Regardless, because the court's interpretation renders meaningless the total number of hours actually worked by a particular employee in a work week, its mistaken characterization of North Star's position does not alter the anomaly presented by the court's conclusion.

when full-time employees are affected by a plant closure or mass layoff.

The anomaly described above also is possible among those who are scheduled the same number of hours in a week, but who work a differing number of days within the week. For example, assume that one group of affected employees in a facility worked four ten-hour shifts per week, while another group of employees in the same plant worked five eight-hour shifts per week.

In this example, if the facility is shut down without notice, the court of appeals' interpretation of the WARN Act would provide employees who worked five eight-hour days with 480 hours of "back pay" (consistent with the finding affirmed by the court of appeals), while the employees who worked four ten-hour days would receive 600 hours of "back-pay." This 120-hour pay (25%) differential also is absurd given the fact that both sets of employees regularly work forty hours per week. The potential discrepancies become more apparent when one considers the vast array of scheduling devices (including twelve-hour shifts and flex-time) that are utilized throughout industry today.

Unfortunately, the court of appeals failed to address these issues. The court opined that, because the anomalous results described did not occur with respect to any of the individuals concerned herein, it need not address the issue. App. at 8a-9a & n.7.[5] However, the court of appeals should not have so readily disregarded the logical consequences of its decision when it adopted an interpretation that will have effects on all subsequent actions. Indeed, such a declination eschews the purpose of the

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[5] Likewise, the court stated that the disputed issue assumed an interpretation of Sections 5(a)(1)(A)(i) and (ii) which was not in dispute. *Id.*

Holy Trinity doctrine. Either the court should have opted for a construction that avoids inconsistent and anomalous outcomes, *see, e.g., United States v. Fausto,* 484 U.S. 439, 450-51 & n.4 (1988), or it should have turned to such aids as legislative history to determine the meaning of Section 5(a)(1), *see, e.g., Public Citizen,* 491 U.S. at 453; *Immigration & Naturalization Service v. Cardoza-Fonseca,* 480 U.S. 421, 431-33 & n.12 (1987) (plurality); *Train v. Colorado Public Interest Research Group,* 426 U.S. 1, 10 (1976); *United States v. American Trucking Ass'n,* 310 U.S. 534, 543 (1940).

The existence of an anomalous or absurd outcome makes it "entirely appropriate to consult all public materials," *Bock Laundry Machine Co.,* 490 U.S. at 527 (Scalia, J., concurring), including legislative history. Here, resort to the legislative history confirms North Star's position that Congress intended to provide a make-whole remedy for violations of the WARN Act. The Senate's Report, as originally introduced by Senator Metzenbaum,[6] makes clear the make-whole intent of the provision that has become Section 5(a)(1) of the WARN Act:

> For violations of the notice provisions, damages are to be measured by the wages and fringe benefits (including reimbursement for medical expenses) *the employee would have received* had the plant remained open or the layoff been deferred until the conclusions [sic] of the notice period, less any wages or fringe

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[6] Senators Metzenbaum, Kennedy, and Simon originally introduced the Bill as the Economic Dislocation & Worker Adjustment Assistance Act (S. 538) in 1987. S. REP. No. 62, 100TH CONG., 1ST SESS. 14 (1987). Senate Majority Leader Robert Byrd called up the Bill as an amendment to the Omnibus Trade Act of 1987 ("OTA"). 133 CONG. REC. S 9389-90 (daily ed. July 8, 1987). After a Presidential veto of the OTA, Senator Metzenbaum reintroduced the plant-closure and mass-layoff provisions as the WARN Act on June 16, 1988. Senator Metzenbaum himself noted that the WARN Act provisions as introduced were identical to the provisions of S. 538 as incorporated into the OTA at the time of its earlier passage. 134 CONG. REC. S. 8375 (daily ed. June 22, 1988).

> benefits received from the violating employer during that period.

S. REP. NO. 62, 100TH CONG., 1ST SESS. 24 (1987) (emphasis added).

Indeed, in defending the current text of Section 5(a)(1) of the WARN Act in Senate floor debates, Senator Metzenbaum emphasized:

> The fact is we do provide that if the notice is not given then there is an obligation to *make up the salary,* but we do not want anybody to think that this bill is a way of providing additional financial obligations on the part of employers. That is not the object of this Bill.

134 CONG. REC. S 8542-43 (daily ed. June 24, 1988) (emphasis added). Accordingly, the interpretation North Star proffers merely effectuates the expressed intent of the WARN Act's chief sponsors. *See National Woodwork Mfrs. Ass'n. v. NLRB,* 386 U.S. 612, 639 (1967) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt.") (citations omitted). Clearly, the court of appeals' decision contravenes congressional intent.

B. The Court of Appeals' Interpretation of Section 5(a)(1) Ignores the Settled and Plain Meaning of the Terms Employed by Congress.

The court of appeals also dismissed North Star's showing that the use of the terms "back pay" and "compensation" in Section 5(a)(1) evidences clear intent by Congress to fashion a make-whole remedy through the use of settled terms having recognized meaning. App. at 5a-8a. In doing so, the court adopted an interpretation that patently offends this Court's repeated admonitions to give words in a statute the effect of their ordinary meaning.

This Court repeatedly has advised: "When Congress codifies a judicially defined concept, it is presumed, ab-

sent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the courts." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 813 (1989) (citing *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494, 501 (1986); *see also Ardestani v. Immigration & Naturalization Service*, 112 S. Ct. 515, 520 (1993) (" '[T]he legislative purpose is expressed by the ordinary meaning of the words used'.") (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)); *Bock Laundry Machine Co.*, 490 U.S. at 527 (Scalia, J., concurring); *Burlington Northern R.R. Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987) (citations omitted).

The phrase "back pay," as a term of art, has acquired a settled meaning within congressional enactments. The meaning of "back pay" has been developed through its use in Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1988) ("NLRA"). This Court has instructed that the term provides "payment . . . of a sum equal to what [the employee] would have earned" during the period for which the Act was violated. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941); *see also Social Security Bd. v. Nierotko*, 327 U.S. 358, 364-65 (1945) (citations omitted).

Congress extended the use of the phrase "back pay" to the remedies provisions of other enactments such as the Civil Rights Act of 1964 ("1964 CRA"), the Mine Safety and Health Amendments ("MSHA"), the Occupational Safety and Health Act of 1970, the Civil Service Reform Act, the Fair Labor Standards Amendments of 1974 ("FLSA Amendments"), and the Back Pay Act.[7]

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[7] *See* Sections 706 and 716 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(g)(1), 2000e-16(b) (1988); Section 105(c)(3) of the Mine Safety & Health Standards Amendments, 30 U.S.C. § 815(c)(3) (1988); Section 11(c)(2) of the Occupational Safety

Consequently, this and other courts have construed the meaning of "back pay" in those statutes in *pari materia* with the *Phelps Dodge* interpretation provided under the NLRA. This includes Congress' utilization of the phrase in the 1964 CRA, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 n.11 (1975); *Ford Motor Co. v. EEOC*, 458 U.S. 219, 226 n.8 (1982); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 366-67 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747, 768-70 (1976), the FLSA Amendments, *Smith v. Office Personnel Mgmt.*, 778 F.2d 258 (5th Cir. 1985), *cert. denied*, 476 U.S. 1105 (1986), and the provisions of MSHA, *Brock ex rel. Parker v. Metric Constr.*, 766 F.2d 469 (11th Cir. 1985).

Thus, the court of appeals' rejection of a make-whole interpretation of Section 5(a)(1) constitutes an impermissible retreat from the principle that Congressional intent is expressed in the use of terms with settled meaning. *See Morissette v. United States*, 342 U.S. 246, 263 (1952); *accord Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1495 (1993) ("Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning'.") (quoting *Perrin v. United States*, 444 U.S. 37,

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& Health Act of 1970, 29 U.S.C. § 660(c)(2) (1988); Section 15(b) of the Fair Labor Standards Amendments of 1974, 29 U.S.C. § 633a(b) (1988); Section 102 of the Civil Service Reform Act, 5 U.S.C. § 7118(a)(7)(c) (1988); Section 1(34)(C) of the Back Pay Act, 5 U.S.C. § 5596 (1988). Other statutes simply adopt the concept of "back pay" by referencing the aforementioned statutes. *See* Section 120(a) of the Rehabilitation Comprehensive Services, and Developmental Disabilities Amendments of 1978, 29 U.S.C. § 794a(a)(1) (1988) (amending Rehabilitation Act of 1973); Sections 107 and 203 of the Americans with Disabilities Act, 42 U.S.C. §§ 12117(a), 12133 (Supp. III 1991) (incorporating Rehabilitaiton Act of 1973 provisions); Section 307 of the Civil Rights Act of 1991, 2 U.S.C. § 1207(h) (Supp. IV 1992) (incorporating 1964 CRA provisions to Senate fair emplyoment practice provisions).

42 (1979)); *Kungys v. United States*, 485 U.S. 759, 770 (1988) (citing *NLRB v. AMAX Coal Co.*, 453 U.S. 322, 329 (1981)).

The fact that the courts regularly turn to the NLRA meaning of the term "back pay" is especially instructive here as the close relationship between the NLRA and the WARN Act is well-recognized. Both the WARN Act itself, as well as its implementing regulations, repeatedly incorporate NLRA provisions.[8] Accordingly, the courts regularly have turned to NLRA precedent to give meaning to the provisions of the WARN Act. For example, the district court in this action relied upon NLRA precedent in granting Respondent's request for prejudgment interest. App. at 33a; *see also Damron v. Rob Fork Mining Corp.*, 739 F. Supp. 341 (E.D. Ky. 1990), *aff'd*, 945 F.2d 121, 124 (6th Cir. 1991) (citations omitted) (both courts adopting the NLRB's test for determining whether there exists a "reasonable expectation of recall" from layoff" under WARN Act regulations); *accord Kildea v.*

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[8] *See* 29 U.S.C. § 2101(a)(4) (1988) (incorporating the NLRA's definition of "exclusive representative" as the "representative" under WARN); *id.* § 2102(a)(1) (imposing a duty on the employer to provide a WARN notice to the affected employees' representative); *id.* § 2103(2) (exempting strikes, lockouts, and the hiring of permanent replacements from the coverage of WARN); *id.* § 2104(a)(5) (providing the employees' representative with standing to initiate a WARN suit); *id.* § 2108 (providing that "[t]he giving of notice pursuant to [WARN], if done in good faith . . . shall not constitute a violation of the [NLRA]"); *see also* 20 C.F.R. § 639.1(g) ("Collective bargaining agreements may be used to clarify or amplify the terms and conditions of WARN . . . ."); *id.* § 639.3(d) (incorporating NLRA definition of exclusive representative); *id.* § 639.5(d) (incorporating the determination of a striker's status from the NLRA to determine when notice must be given); *id.* § 639.6 (requiring notice be given to exclusive representatives); *id.* § 639.7(c) (detailing the information that must be provided to the employees' exclusive representative); *id.* § 639.7(e)(6) (requiring that the employer inform the local government of the name of the employees' exclusive representative).

Elector Wire Prods., Inc., 775 F. Supp. 1014, 1016 n.2 (E.D. Mich. 1991) (citing *Damron*).[9]

The careful dovetailing of the NLRA and the WARN Act confutes the court of appeals' determination that Congress intended a meaning for "back pay" in the WARN Act that is different from the meaning ascribed to that term in the NLRA. *Cf. Bock Laundry Machine Co.*, 490 U.S. at 527 (Scalia, J., concurring) (noting that terms should be given an interpretation that is "most compatible with the surrounding body of law into which the provision must be integrated.").

Congress' intent to fashion a make-whole remedy is buttressed further by its characterization of WARN Act damages as "compensation." 29 U.S.C. § 2104(a)(1)(A) (1988). This term also clearly connotes the intent to provide a remedy in the nature of an "[i]ndemnification, . . . [or] making whole." BLACK'S LAW DICTIONARY 283 (6th ed. 1991). In light of the settled meaning of the terms employed in Section 5(a)(1) of the WARN Act, the court of appeals' interpretation of Section 5(a)(1) represents a clear departure from the express intent of Congress.

C. The Court of Appeals' Interpretation of Section 5(a)(1) Renders Meaningless Sections 5(a)(2)(A) and 5(a)(3).

In reaching its determination that Section 5(a)(1) requires payment of damages during times in which no damages were incurred, the court of appeals quoted

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[9] In fact, the applicability of the NLRA to plant closing issues continues to be a topic of much debate in labor-law circles in light of a recent NLRB pronouncement on the issue. *See Dubuque Packing Co.*, 303 NLRB 386 (1991), *enf'd*, 1 F.3d 24 (D.C. Cir. 1993); *see also* Peter F. Munger *et al.*, *Plant Closures & Relocations Under the National Labor Relations Act*, 5 GA. ST. L. REV. 77, 81-83 (1988); FRANCIS A. O'CONNELL, JR., PLANT CLOSINGS: WORKER RIGHTS, MANAGEMENT RIGHTS & THE LAW 17 (1986) (stating that the NLRA applies to plant closings both in the duty to bargain and through Section 8(a)(3)'s discrimination prohibitions).

United States v. Nordic Village, Inc., 112 S. Ct. 1011, 1015 (1992), for the proposition that "a statute must, if possible, be construed in such fashion that every word has some operative effect." App. at 6a. Unfortunately, the result of the court's decision is a defiance of this very principle.

As shown above, the court of appeals' interpretation strips the terms "back pay" and "compensation" of their intended meaning, and thus, of their operative effect. In addition, the court's decision also eviscerates the offset provision of Section 5. Subsection 5(a)(2)(A) of the Act provides: "The amount for which an employer is liable under [Section 5(a)(1)] shall be reduced by any wages paid by the employer to the employee for the period of the violation." 29 U.S.C. § 2104(a)(2)(A). The Conference Report that was adopted as the legislative history of the WARN Act, *see supra* note 3, explains that the employer's reduction of its liability through the payment of wages for hours worked is coextensive with the extent of that liability.

The Conference Report provides an example which relates to WARN Act liability that is triggered by a reduction of hours in excess of fifty percent (50%). *See* 29 U.S.C. § 2101(a)(6)(C). The Conference noted that an employer who reduced hours by 75% could offset its WARN Act liability by the amount paid for the remaining 25% of hours worked. H.R. CONF. REP. NO. 576, 98TH CONG., 2D SESS. 1052 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2086. Likewise, where as here, there are forty-four working days within the specific sixty-day violation period at issue, an employer should have a 25% offset if a given employee works eleven days.

Under the court of appeals' interpretation, however, the employer would be liable not only for the remaining 75% of earnings lost, but also for the nonscheduled days for which the employee had not worked. Taken to its logical end, even if a given employee worked every

scheduled day of the violation period to assist in the shutdown of an affected facility after his or her coworkers had been laid off, he or she would nonetheless be entitled to "back pay" for the preceding nonscheduled days (e.g. weekends) within the violation period. Such a result simply cannot be squared with the intent of Congress as expressed in the Conference Report.

The court's interpretation also creates an irregularity in the plain meaning of Section 5(a)(3)—the WARN Act's civil penalties provision. That Section permits an employer to avoid the payment of fines to a governmental unit if it renders payment of Section 5(a)(1) "back pay" to aggrieved employees within three weeks of a plant closure or mass layoff. 29 U.S.C. § 2104(a)(3). If Section 5(a)(1) means what the court of appeals says, then employers would be required to pay a full measure of sixty days of pay to the employees to escape civil-penalty liability.

Yet, employers could simply escape this excess liability by providing notice and keeping employees on the payroll without actually assigning their normal duties to them during the sixty day period. *See* Preamble to WARN Act Regulations, 54 Fed. Reg. 16048 (April 20, 1989) ("[N]either WARN nor the regulations dictate the nature of work to be performed—*or whether work must be performed*—during a period of employment after notice . . . has been given.") (emphasis added).

Again, the only manner in which this paradox can be resolved is to construe Section 5(a)(1) as providing make-whole relief. Otherwise, the court of appeals' interpretation of Section 5(a)(1) will present irreconcilable tensions with the mandates of Section 5's offset and civil-penalties provisions. *See Commissioner of Internal Revenue v. Keystone Consol. Indust.*, 113 S. Ct. 2006, 2011 (1993) (recognizing that statutes "must be given 'as great an internal symmetry and consistency as its words permit'.") (quoting *Commissioner Internal Revenue v. Lester*, 366 U.S. 299, 304 (1961)).

CONCLUSION

If left uncorrected, the court of appeals' determination will result in staggering disparities in both the amounts received by aggrieved employees, and the amounts which faltering employers must pay. Employers of part-time workers will experience especially harsh treatment as the result of the decision. Such irrational results not only are impermissible, they also contravene the expressed intent of Congress and render Section 5 of the Act unworkable as a whole. The means by which the court of appeals reached its result constitutes an impermissible departure from this Court's directives as to statutory construction. As a result, there is an increased likelihood that the growing number of employers and employees affected by the WARN Act will be unable to resolve any disputes thereunder in an efficient and timely manner when confronted with this issue.

For the foregoing reasons, North Star respectfully requests that this Court grant the instant Petition.

Respectfully submitted,

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